

Washington International Law Journal

Volume 11 | Number 2

3-1-2002

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Recommended Citation

Jessica E. Tauman, Comment, *Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 Pac. Rim L & Pol'y J. 461 (2002).

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RESCUED AT SEA, BUT NOWHERE TO GO: THE CLOUDY LEGAL WATERS OF THE *TAMPA* CRISIS

Jessica E. Tauman[†]

Abstract: On August 26, 2001, the Norwegian cargo ship M/V *Tampa* rescued 438 passengers from a sinking ferry in the Indian Ocean. Most of the rescued were migrants from Afghanistan on their way to Australia. When the *Tampa* reached Australian waters, it was refused entry and a weeklong standoff between Norway, Indonesia, and Australia ensued. A shipmaster's duty to rescue is well established in international law, recognized by both the United Nations Convention on the Law of the Sea and the International Convention for the Safety of Life at Sea. What is not clear is whether a corresponding legal duty applies to coastal states and transit states when those rescued are migrants seeking asylum. Rescuing migrants at sea is not a new phenomenon, but increased mobility and worsening humanitarian disasters demand a comprehensive international solution that imposes clear legal obligations on states. Closing the gaps in existing law would alleviate the burden on the Good Samaritan and provide for clear, humane, and consistent strategies for dealing with refugees so as to avoid another situation like the *Tampa* incident.

I. INTRODUCTION

On Sunday, June 4, 1939, the German passenger liner S.S. *St. Louis* hovered close to the shores of Miami Beach with 907 Jewish refugees from Nazi Germany on board. U.S. Coast Guard cutters surrounded the ship to halt attempts by the refugees to reach shore. The ship had been scheduled to land its passengers in Havana, Cuba, but the Nazi propaganda machine had swayed Cuban public opinion and, consequently, President Frederico Bru reneged on his offer of asylum. The crew and refugees on the *St. Louis* were waiting for a decision by President Franklin Delano Roosevelt on their request for political asylum—their final hope. Their request was ignored, and after attempts to broker an agreement with the Dominican Republic failed, the ship was left with no alternative but to return to Europe. The German captain, more humane than the Americans ashore, brought these refugees to Holland, Belgium, France, and Britain. A year later, the Nazis

[†] The author would like to thank Professor Veronica Taylor and Professor Dan Bodansky for their advice at the early stages, and Professor William Burke for his comments at the end. The author would also like to thank the *Pacific Rim Law & Policy Journal* Editorial Staff for their support. Finally, the author is deeply grateful to Professor Craig Allen for his generous and patient guidance from start to finish. Any errors or omissions are the author's own.

invaded Holland, Belgium, and France, and nearly half of the *St. Louis* refugees eventually perished in Nazi gas chambers.¹

Half a century later, and half a world away, a drama eerily similar to the fated "Voyage of the Damned" played out. Only this time, instead of Jews, the refugees were Afghans; and, instead of Nazis, it was the oppressive Taliban they were fleeing. Instead of American politics, Australian politics controlled. But like those aboard the Voyage of the Damned, these asylum seekers had as their rescuer a principled and humane ship captain.

On Sunday, August 26, 2001, Arne Rinnan, the Norwegian captain of the *Tampa*, responded to a call from Australian Search and Rescue and discovered an Indonesian ferry in distress. The sinking wooden vessel was loaded with nearly 440 asylum seekers attempting to reach Christmas Island, Australia. The captain and his crew rescued the ferry passengers and brought them on board the *Tampa*, a Norwegian cargo vessel. Recognizing that his ship was in violation of safety standards, and bowing to pressure by the rescued asylum seekers, Captain Rinnan proceeded to nearby Christmas Island. The *Tampa*'s small crew of twenty-seven feared that the rescued passengers would overpower them. Australian officials, who initially granted permission to Captain Rinnan to offload his additional passengers, later changed their minds. Instead, when the vessel reached Australia's territorial seas, the government sent out a naval vessel to turn back the *Tampa*.

The mostly Afghan migrants endured a tense, weeklong standoff in which multiple states, the United Nations and international organizations weighed in. They were finally transported to the island nation of Nauru for refugee claim processing.²

This Comment discusses the *Tampa* incident in Part II. Part III summarizes the current legal framework for resolving international disputes regarding refugees rescued at sea. Part IV examines the obligations imposed on shipmasters under international law and concludes that Captain Rinnan acted in accordance with those obligations. Part V examines the duties imposed on flag states, coastal states, and transit states, and Part VI concludes that these duties are inadequate to protect a Good Samaritan like Captain Rinnan from a repetition of the *Tampa* incident. Part VII explores

¹ The fateful trip of the *St. Louis* is popularly referred to as "The Voyage of the Damned." Details about the Voyage of the Damned are retold in GORDON THOMAS & MAX MORGAN WITTS, *THE VOYAGE OF THE DAMNED* (1974).

² For a detailed account of the *Tampa* incident, see Daniel Williams, *Adrift and Unwanted: A Norwegian Ship Saves 438 Asylum Seekers—And Triggers an Ugly Diplomatic Row over Their Fate*, *TIME* (Int'l ed.), Sept. 10, 2001, at 61.

the International Maritime Organization's responses to these inadequacies and Part VIII suggests legal and extralegal solutions to the problem. Finally, this Comment concludes that an international solution, which includes the strengthening of legal obligations of coastal, flag and transit states, must be reached before history repeats itself. Increased mobility and worsening humanitarian disasters compel a comprehensive plan to prevent protracted ad hoc decisions by government leaders on the fate of asylum seekers and to alleviate the burden placed on shipmasters complying with international law. State sovereignty must be balanced against humanitarian concerns so as to avoid another tragedy like the *St. Louis* or standoff like the *Tampa*.

II. THE *TAMPA* INCIDENT

A. *The Rescue*

On Sunday, August 26, 2001, while in Indonesian territorial waters, Captain Arne Rinnan of the M/V *Tampa* found himself in a situation that has become increasingly commonplace.³ Alerted of the need to perform a rescue operation, Captain Rinnan answered the call imposed by the time-honored international maritime tradition of rescuing persons at sea if it can be done safely. This obligation stems from customary practice and from laws passed in response to the *Titanic* disaster.⁴

Australian Search and Rescue ("AusSAR") had asked Captain Rinnan to investigate a vessel in distress in the Christmas Island-Indonesian waters area of the Indian Ocean.⁵ Responding to this call, Captain Rinnan proceeded to assist and discovered a rickety wooden ferryboat, the KM

³ *Oceans and the Law of the Sea: Report of the Secretary General*, U.N. GAOR, 56th Sess., Agenda Item 30(a), at 11, U.N. Doc. A/56/58/Add.1, (Oct. 5, 2001) [hereinafter *Ocean Report to the Secretary General*]. The number of people being smuggled worldwide is increasing. *Id.* France, Greece and Italy detected around 3,375 illegal migrants transported by sea between April 1999 and April 2001. *Id.* Spain reported it had detected around 17,000 illegal migrants. *Id.*

⁴ *SOLAS: The International Convention for the Safety of Life at Sea, 1974*, FOCUS ON IMO, Oct. 1998, at 1, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D727/SOLAS98.pdf. The *Titanic* sank on her maiden voyage in the North Atlantic in April 1912. *Id.* More than 1,500 passengers and crew died and, in response, the United Kingdom proposed a conference to develop international regulations. *Id.* Thirteen countries participated and the result was that the International Convention of the Safety of Life at Sea was adopted on January 20, 1914. *Id.*

⁵ Michael White, *The Tampa and the Law*, SEAWAYS, THE INTERNATIONAL JOURNAL OF THE NAUTICAL INSTITUTE, Oct. 2001, at 5. Christmas Island is located in the Indian Ocean, 930 miles (1500 kilometers) off the jagged and sparsely populated northwest coast of the Australian mainland, and about 200 miles (320 kilometers) south of the Indonesian island of Java, which makes it accessible to small wooden vessels departing from Java. Williams, *supra* note 2.

Palapa 1, just seventy-five nautical miles northwest of Christmas Island.⁶ Although AusSAR initially told Captain Rinnan that the vessel contained approximately eighty passengers, Captain Rinnan and his crew soon realized the sinking boat in fact carried nearly 440 passengers—most of whom were Afghan asylum seekers⁷—and a small Indonesian crew of six,⁸ all of whom were in immediate danger of drowning. According to Captain Rinnan, “Their boat was in a very bad state. It was taking in a lot of water and was about to sink.”⁹ The twenty-seven-member crew¹⁰ of the *Tampa* quickly transferred the passengers from the sinking Indonesian ferry.¹¹ Although the *Tampa* has expansive cargo space, it was not equipped to accommodate large numbers of passengers.¹²

The *Tampa* resumed its voyage towards the next port of call, Singapore, intending to make a detour in Indonesia to offload the rescued passengers.¹³ However, after considerable pressure from the rescued

⁶ *Id.* Australia claimed initially that the *Palapa 1* was closer to Java; however, the distressed vessel was actually discovered 246 nautical miles (approximately 397 kilometers) from Merak, the nearest Indonesian port. David Marr & Marian Wilkinson, *They Shall Not Land*, SYDNEY MORNING HERALD, Oct. 20, 2001, at 29, available at 2001 WL 27860990.

⁷ Some reports claim that over one hundred of these asylum seekers may not have been Afghans fleeing the Taliban regime, but instead were Pakistanis. *Australia Finds Evidence Tampa Boatpeople Includes Bogus Refugees*, AGENCE FRANCE-PRESSE, Sept. 24, 2001, available at 2001 WL 25020224. Several of the migrants are believed to be members of the Hazaras, one of the world's most persecuted ethnic minorities, who have endured a century of persecution in Afghanistan. *Id.* According to Refugee Council of Australia chairman William Maley, “It would be difficult in the world today to point to another ethnic group which is at as much risk as the Hazaras are.” *Id.* More than 2,000 Hazaras, who are Shi'ite Muslims of East Asian ethnicity, were killed in three days in 1998. *Id.*

⁸ The Indonesian crew numbered only six, all of whom were charged in Australia with people-smuggling. Darren Gray & Michael Gordon, *Boat People on the Move*, AGE, Sept. 4, 2001, at 1, available at 2001 WL 25934940.

⁹ The refugees had been aboard the wooden ship for about ten days and their boat was in such bad shape it “crumbled when *Tampa* tried to haul it aboard.” Press Archive, *Containership Tangled in Refugee Controversy*, Baltic and Int'l Maritime Council, Sept. 3, 2001, at <http://www.bimco.org>.

¹⁰ The *Tampa* crew consisted of fourteen Filipinos, eleven Norwegians, and two Indians. Pang Ai Lin, *Freighter's Crew Shaken by Boat People Experience*, AGENCE FRANCE-PRESSE, Sept. 6, 2001, available at 2001 WL25005926.

¹¹ *Containership Tangled in Refugee Controversy*, *supra* note 9. This rescue mission was quite dangerous, as this firsthand account by First Officer Christian Maltau illustrates:

The seas were quite rough, so the distressed vessel was bouncing up and down against our ship's side as the captain turned the *Tampa* round . . . that little boat was not in very good condition when we first took alongside, and she was definitely a lot worse when this operation was over.

Jake Lloyd-Smith, *Heroes of the High Seas*, SOUTH CHINA MORNING POST, Sept. 7, 2001, at 17, available at 2001 WL 25743828.

¹² Louise Dodson, Kerry Taylor & Mark Forbes, *Tension in Coalition as Stalemate Deepens*, AGE, Aug. 29, 2001, at 1, available at 2001 WL 25934344.

¹³ Williams, *supra* note 2.

passengers,¹⁴ Captain Rinnan proceeded instead to nearby Christmas Island, Australia, the original destination of the abandoned ferry.¹⁵

B. Australia's Response

Instead of granting the *Tampa* right of entry to offload its passengers,¹⁶ the Australian government refused to allow the *Tampa* to enter its territorial waters.¹⁷ Captain Rinnan issued a distress signal because he was concerned about the medical situation on board; he then entered Australian waters seeking assistance.¹⁸ The assistance the *Tampa* received, however, was not the medical and humanitarian assistance Captain Rinnan had anticipated; rather, armed personnel from the army Special Air Service ("SAS") unit boarded and took control of the vessel and demanded that the *Tampa* leave Australian territorial waters.¹⁹

¹⁴ A group of refugees approached the Captain and his crew and demanded they be taken to Australia "or any other Western country." Williams, *supra* note 2. Not long after this incident Iraqi refugees on board another vessel allegedly began throwing children overboard to reinforce their point. *Australia Needs a Coast Guard*, AGE, Oct. 9, 2001, at 18, available at 2001 WL 28697146. However, these reports were later discredited. See Vanda Carson & Natalie O'Brien, *Children Swam for their Lives*, AUSTRALIAN, Nov. 9, 2001, LEXIS, News Library.

¹⁵ White, *supra* note 5, at 5. The Australian government later used this change of course as a political justification for their response, asserting, "It is completely unacceptable to the Australia government that people picked up in a distress situation then seek to dictate the country in which they will be landed." *Australia's Refugee Record*, Embassy of Australia, at <http://www.austemb.org/PDFs/REFUGEE.PDF> (last visited Feb. 25, 2002).

¹⁶ "Clearly the situation . . . is that that vessel is not seaworthy to carry 450 survivors anywhere," said Peter Dexter, regional director for the Norwegian shipping company, Wallenius Wilhelmsen, the *Tampa*'s owner. Melissa Fyfe & Farah Farouque, *Tampa Not Seaworthy for So Many*, AGE, Aug. 31, 2001, at 5, available at 2001 WL 25934660.

¹⁷ United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 1833 U.N.T.S. 397 [hereinafter LOSC], reprinted in 21 I.L.M. 1261 and 6C ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY, Doc. No. 10-6, (Frank L. Wiswall ed., 7th rev. ed. 2001). According to LOSC, Article 3, "[E]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles."

¹⁸ The Australian Immigration Minister Philip Ruddock reportedly accused Captain Rinnan of exaggerating the medical crisis; however, the spokesperson for the ship owner, Wallenius Wilhelmsen quickly countered, "We feel the captain has acted most appropriately and in the best interests of everyone The captain is a sailor, not a doctor." Fyfe & Farouque, *supra* note 16. Captain Rinnan issued an emergency call for medical help, reporting that on board the *Tampa* there were at least ten unconscious people, two pregnant women with stomach cramps whom the male crew could not examine, an outbreak of scabies and widespread dysentery. Paul Ham & Jamie Walker, *Refugees Becalmed as Deal Stalls*, SUNDAY TIMES (London), Sept. 2, 2001, at 18, available at 2001 WL 25425913.

¹⁹ According to an Australian news account, an Australian scholar of maritime law, Jean-Pierre Fonteyne, said that "he knew of no other case where troops had boarded a vessel carrying asylum seekers and demanded it to go back to international waters" and that "Australia's actions set a dangerous precedent." Darrin Farrant & Darren Gray, *Australia's Legal Position Eroding, Say Experts*, AGE, Aug. 31, 2001, at 6, available at 2001 WL 25934636; see generally White, *supra* note 5, at 5 (describing Australia's response to the *Tampa* incident).

After a weeklong standoff and an intervening lawsuit,²⁰ the rescued passengers were finally transferred to an Australian naval ship, HMAS *Manoora*, on September 3, 2001. The *Manoora* was en route to Papua New Guinea, where the migrants' asylum claims were to be processed, when Australia announced that a protracted negotiation had resulted in an agreement that New Zealand would take 150 of the refugees, the tiny Pacific nation of Nauru would accept the others, and the U.N. High Commission on Refugees would process their claims.²¹ In the following months, both Australia and Norway issued statements in the U.N. General Assembly regarding the handling of the *Tampa* situation.²²

Recently, waves of illegal immigrants, or "boat people,"²³ have tried to reach Australia.²⁴ Most have been from countries other than those from

²⁰ *Vadarlis v. Ruddock*, 64 A.L.J. 67, 2001 FCA 1297 (2001). Eric Vadarlis, an independent solicitor, prevailed in Australian Federal Court on behalf of the asylum seekers. Justice North held that the government had illegally detained the migrants. The Full Court reversed, holding that the asylum seekers were not detained and the Federal Government had acted constitutionally within its executive power to prevent the migrants from landing. *Ruddock v. Vadarlis*, 183 A.L.J. 1, 2001 FCA 1329 (2001). For a more complete discussion of the full court decision, see Emily Peyser, Comment, "Pacific Solution"? *The Sinking Right to Seek Asylum in Australia*, 11 PAC. RIM L. & POL'Y J. 431, 455 (2002).

²¹ *Australia Arrests Four in Asylum Case; 433 Refugees Board Navy Troop Carrier*, BOSTON GLOBE, Sept. 4, 2001, at A11, available at 2001 WL 3949474. Nauru, located in the South Pacific near the equator, was once one of the richest countries per capita, from proceeds of the phosphate that composed most of Nauru's structure, but now that the phosphate is gone, the Australian mining companies have been replaced by Russian money-launderers. *Election Ahoy*, ECONOMIST (U.S. ed.), Sept. 8, 2001. Nauru is already highly dependent on Australian aid. *Id.* "The shrubby island is ravaged by decades of phosphate mining and punctured by craggy coral outcrops and there is none of the tropical abundance traditionally associated with Pacific islands." *Boat People Swelter on Barren Pacific Island*, N.Z. HERALD, Sept. 22, 2001, available at 2001 WL 27363518; see generally *Paradise Well and Truly Lost—Nauru*, ECONOMIST (U.S. ed.), Dec. 22, 2001 (describing the geographic and economic conditions of Nauru).

²² See, e.g., Statement by H.E. Mr. Ole Peter Kolby, *General Assembly, Ending Review of U.N. Disaster Relief Assistance, Seeks Humanitarian Aid for Tajikistan, Hurricane-Stricken Belize, Debate Begins on Issues Related to Oceans, Law of the Sea Convention*, U.N. GAOR, 56th Sess., 65th plen. mtg., U.N. Doc. GA/9980 (Nov. 27, 2001) (suggesting that the *Tampa* incident might erect an obstacle to prevent those at sea from being rescued); see also Statement by H.E. Mr. David Stuart, Ambassador and Deputy Permanent Representative of Australia to the United Nations, *General Assembly Warned of Deterioration of Marine Resources, Over-Exploitation of Fish Stocks, Speakers in Debate on Oceans and Law of Sea Also Stress Problems of Piracy, Maritime Robbery, Smuggling of Migrants*, U.N. GAOR, 56th Sess., 66th plen. mtg., U.N. Doc. GA/9981 (Nov. 28, 2001) (clarifying the importance of assisting persons in distress at sea, responding to the Norwegian statement, and asserting that situations like the *Tampa* incident should not be used as a means to enter a state unlawfully). For other related Australian and Norwegian government positions, see Philip Ruddock, *UNconventional: A Point of View*, UNITED NATIONS CHRONICLE, No. 2, 2001, at 34, available at <http://www.un.org/Pubs/chronicle/2001/issue2/0102p34.htm>; *Norwegian Vessel M/S Tampa*, <http://odin.dep.no/odinarkiv/norsk/dep/ud/p10002480/pressern/032091-070082/index-dok000-b-n-a.html> (last visited Feb. 25, 2002).

²³ Boat people are generally defined as those who come by boat with the intention of migrating, with the implication that they come illegally. See *Election Ahoy*, *supra* note 21. Australia's first boat people were a group of British convicts who landed at what is now Sydney in 1788 and the country has been formed by waves of immigrants ever since. *Id.*

²⁴ This problem is not restricted to Australia. The United States has employed a high seas interdiction program since the 1980s. For a discussion of United States policies and Australian policies,

which Australia has traditionally received migrants.²⁵ Consequently, immigration emerged as a central issue in Prime Minister John Howard's reelection,²⁶ and the Australian parliament passed several tough new immigration laws aimed at boat people.²⁷

III. INTERNATIONAL LEGAL FRAMEWORK

The current legal framework for resolving international disputes over refugees rescued at sea is provided by the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, and the United Nations Convention relating to the Status of Refugees.

A. *The United Nations Convention on the Law of the Sea*

The 1982 United Nations Convention on the Law of the Sea ("LOSC")²⁸ is the most comprehensive international law project ever completed.²⁹ The LOSC has detailed provisions regulating the oceans and has been widely adopted.³⁰ In fact, parts of the convention are considered customary international law,³¹ binding even on non-parties.³²

see generally Peyser, *supra* note 20; Bill Frelick, *U.S. Refugee Policy in the Caribbean: No Bridge Over Troubled Waters*, 20 FLETCHER F. WORLD AFF. 67 (1996) (discussing U.S. Haitian interdiction policy and suggesting models for refugee management); *see also* The Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement: Haitian Centers Council v. McNary*, 6 HARV. HUM. RTS. J. 1 (1993) (providing an overview of the Haitian refugee crisis in the United States and the role of the President, Congress, and the courts); and Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L. J. 1 (1994) (examining the decision in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993)).

²⁵ Traditionally, Australia has received waves of immigrants from China and Vietnam; however, Afghan and Iraqi asylum-seekers, who transit through a third country, now account for the largest portion of those arriving by boat over the past two years. *See Election Ahoy, supra* note 21.

²⁶ *Id.*

²⁷ The new laws would reduce the status of asylum seekers who reach mainland Australia and force those who land on its outlying islands, such as Christmas Island, to return to their last port of call, removing the opportunity to claim refugee status; the Parliament also passed increased penalties for "people smugglers." *See Peyser, supra* note 20, at 455-57, for a more detailed discussion of the specifics of these laws.

²⁸ LOSC, *supra* note 17.

²⁹ Craig H. Allen, *Protecting the Oceanic Gardens of Eden: International Law Issues in Deep Sea Vent Resource Conservation and Management*, 13 GEO. INT'L ENVTL. L. REV. 563, 586 (2001).

³⁰ As of February 6, 2002, 138 states had ratified the LOSC. *Table recapitulating the Status of the Convention and of the Related Agreements, as at 6 February 2002, available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm [hereinafter Status of LOSC].

³¹ Customary international law is one of the primary sources of law (along with treaties and general principles) under the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, art. 38 (1) (b) [hereinafter ICJ Statute], *available at* <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext>

Prior to the LOSC and its precursors, the four 1958 Geneva Conventions on the Law of the Sea,³³ the law of the sea reflected the constant struggle between states that asserted special rights and others that demanded the freedom to fish³⁴ and navigate in all the open seas.³⁵ Disagreement over military vessels and aircraft created further conflict.³⁶ The LOSC was the international maritime response to this struggle. The Third United Nations Conference on the Law of the Sea was convened in 1973 in New York, with the express goal of writing a comprehensive treaty for the oceans.³⁷ More than 150 sovereign states participated in the process, which ended in 1982 with the adoption of the LOSC.³⁸ The LOSC came into force on November 16, 1994, twelve months³⁹ after Guyana became the

/ibasicstatute.htm. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT] provides that "customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." See also Daniel Bodansky, *Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond*, 18 *ECOLOGICAL Q.* 719, 727 n.35 (1991).

³² For instance, the United States is not a party to the LOSC; however, President Reagan stated that certain provisions of the LOSC reflect customary international law. See Proclamation, No. 5928, 54 Fed. Reg. 777, (Dec. 27, 1988), reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 10-2; see also Mark J. Yost, *International Maritime Law and the U.S. Admiralty Lawyer: A Current Assessment*, 7 *U.S.F. MAR. L.J.* 313, 348 (1995). Lieutenant Commander Yost suggests that the LOSC "provides a comprehensive framework for use of the oceans by all countries with maritime interests. In certain parts, it codifies the rules of customary international law while in others, it establishes a legal structure where one previously did not exist." (citing Message from the President of the United States transmitting United Nations Convention on the Law of the Sea, with Annexes, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. VII-IX (Oct. 7, 1994) (Report of the Secretary of State)); John Astley III and Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 *A.F.L. REV.* 119, 122, (1997); RESTATEMENT, *supra* note 31, § 102(2).

³³ Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962), reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 10-1; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (entered into force June 10, 1964), reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 10-4; Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964), reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 10-3; and Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 599 U.N.T.S. 285 (entered into force Mar. 20, 1966), reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 11-16.

³⁴ For example, the 1958-1976 "cod wars" between Iceland and the United Kingdom saw British Navy ships dispatched to rescue a fishing vessel seized by Iceland for violating its fishing rules. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 284, 426, 449 (3d ed. 1999). In a more modern example, in April 1995, there was a confrontation between Spanish fishermen from the coastal regions of Galicia and Canadian fishermen from Nova Scotia over turbot. John Darnton, *Spanish Stirred by 'War' over a Fish They Don't Eat*, N.Y. TIMES, Apr. 15, 1995, at A1, available at 1995 WL 2172014. The conflict ultimately came to a head with both the Canadian and the Spanish navies sending gunboats, which led to bilateral repercussions for both nations. Jessica Mathews, *On the High Seas: The Law of the Jungle*, WASH. POST, Apr. 9, 1995, at C7, available at 1995 WL 2087634.

³⁵ RESTATEMENT, *supra* note 31, pt. V, intro. note.

³⁶ See, e.g., CHURCHILL & LOWE, *supra* note 34, at 109.

³⁷ *Id.* at 16.

³⁸ *Id.* at 17.

³⁹ LOSC, *supra* note 17, art. 308.

sixtieth state to ratify it.⁴⁰ Both Australia and Norway have also ratified the LOSC.⁴¹ One of the most important achievements of the LOSC was the establishment of a twelve-mile territorial sea,⁴² within which coastal states are sovereign. However, the LOSC also provided for a corresponding right of “innocent passage” for foreign naval and merchant ships through the territorial seas of a coastal state.⁴³

B. *The International Convention for the Safety of Life at Sea*

The International Convention for the Safety of Life at Sea of 1974 (“SOLAS”)⁴⁴ is instrumental to the promotion of vessel safety.⁴⁵ SOLAS was first adopted in 1914, following a meeting of representatives from thirteen maritime nations who had gathered to develop international ship safety regulations following the sinking of the *Titanic* two years earlier.⁴⁶ World War I, however, prevented the draft convention from gaining general acceptance.⁴⁷ Another conference met in London in 1929 and the text adopted was put into effect by nearly every maritime nation in the world.⁴⁸ The 1978 Protocol⁴⁹ was added to SOLAS in response to a series of shipping accidents involving oil tankers in 1976 and 1977.⁵⁰ SOLAS has since been revised many times and now operates under the auspices of the United Nations International Maritime Organization (“IMO”).⁵¹ SOLAS includes

⁴⁰ CHURCHILL & LOWE, *supra* note 34, at 19.

⁴¹ Status of LOSC, *supra* note 30.

⁴² See LOSC, *supra* note 17, art. 3. Prior to the LOSC, most of the major powers followed the three-mile territorial sea limit, thought to originate from the “cannon-shot” rule; the notion that coastal states could exercise dominion over their territorial seas as far as projectiles could be fired from a cannon based on shore. CHURCHILL & LOWE, *supra* note 34, at 77-78. Although this rule was widely accepted, it was never universal, and it was the departure from this three-mile limit that caused conflict. *Id.* at 78. Disagreement over the width of the territorial sea caused three previous attempts at codification of the territorial sea limits to fail: the 1930 Hague Convention, the First United Nations Conference on the Law of the Sea in 1958, and the Second United Nations Conference on the Law of the sea in 1960. *Id.*

⁴³ LOSC *supra* note 17, art. 17.

⁴⁴ Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, 164 U.N.T.S. 113 [hereinafter SOLAS], reprinted in 6D BENEDICT, *supra* note 17, Doc. No. 14-1.

⁴⁵ Craig H. Allen, *The ISM Code and Shipowner Records: Shared Safety Goals vs. Industry's Privacy Needs*, 11 U.S.F. MAR. L.J. 1, 3 (1998-1999).

⁴⁶ *Surviving Disaster—Life-Saving at Sea*, FOCUS ON IMO, Jan. 2000, at 1, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D728/surviv.pdf.

⁴⁷ Michael F. Sturley, *The Law of Treaties and Admiralty*, in 6 BENEDICT, *supra* note 17, Supp. 1993 at 1-29.

⁴⁸ *Id.*

⁴⁹ Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, T.I.A.S. No. 10009, reprinted in 6D BENEDICT, *supra* note 17, Doc. No. 14-1.

⁵⁰ SOLAS: *The International Convention for the Safety of Life at Sea*, 1974, *supra* note 4, at 6.

⁵¹ The IMO was originally established in 1958 as the Inter-Governmental Maritime Consultative Organization, and the name was changed to International Maritime Organization in 1982. *Basic Facts*

several important safety regulations governing navigation and construction of ships and standardizes the requirements for safety equipment and inspections.⁵² The current version of SOLAS was adopted at a conference in London in 1974.⁵³ SOLAS has since been ratified by 145 countries—including Norway and Australia—which represent 98.5% of the world's shipping tonnage.⁵⁴

The Global Maritime Distress and Safety System ("GMDSS") began in the 1970s and was incorporated into the SOLAS Convention by amendment in 1992.⁵⁵ The basic precept of GMDSS is that the "search and rescue ("SAR") authorities ashore, as well as shipping in the immediate vicinity of the ship in distress, will be rapidly alerted to a distress incident so they can assist in a coordinated SAR operation with the minimum delay."⁵⁶

C. *International Convention on Maritime Search and Rescue*

The International Convention on Maritime Search and Rescue ("SAR Convention")⁵⁷ provides a comprehensive international system covering search and rescue operations.⁵⁸ The SAR Convention was adopted in 1979 by a conference in Hamburg and became effective in 1985.⁵⁹ Seventy-five states, including Australia and Norway, are parties to the SAR Convention.⁶⁰ Indonesia, though not a party,⁶¹ recognizes its duty to provide search and rescue services in bilateral arrangements with Australia.⁶²

about IMO, FOCUS ON IMO, Mar. 2000, at 1, available at http://www.imo.org/includes/lastDataOnly.asp/data_id%3D710/Basics.pdf (providing a description of the IMO and its structure). For a discussion of the IMO's role in international maritime law, see Yost, *supra* note 32, at 319-25.

⁵² Sturley, *supra* note 47, at 1-29; *Surviving Disaster—Life-Saving at Sea*, *supra* note 46, at 3.

⁵³ This version of SOLAS entered into force on May 25, 1980 and the 1978 Protocol entered into force nearly a year later, on May 1, 1981. International Maritime Organization, *Summary of Status of Conventions as at 31 January 2002*, available at http://www.imo.org/conventions/mainframe.asp?topic_id=247 (last visited Feb. 25, 2002) [hereinafter *Summary of Status of Conventions*].

⁵⁴ *Id.*

⁵⁵ *Shipping Emergencies—Search and Rescue and the GMDSS*, FOCUS ON IMO, Mar. 1999, at 7, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D1478/GMDSSandSAR1999.pdf.

⁵⁶ *Id.* at 1.

⁵⁷ International Convention on Maritime Search and Rescue, Apr. 27, 1979 (entered into force on June 22, 1985) [hereinafter SAR Convention], reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 3-14.

⁵⁸ *Shipping Emergencies—Search and Rescue and the GMDSS*, *supra* note 55, at 2.

⁵⁹ *Id.*

⁶⁰ *Summary of Status of Conventions*, *supra* note 54.

⁶¹ *Id.*

⁶² See, e.g., Australia-Indonesia: Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, reprinted in 29 I.L.M. 469 (1990). This treaty requires that Indonesia and Australia cooperate on arrangements for search and rescue taking into account "generally accepted rules, regulations and procedures established through competent international organizations. *Id.* art. 14.

Although the duty for coastal states to perform search and rescue operations is incorporated in both the LOSC⁶³ and SOLAS,⁶⁴ prior to the SAR Convention, there was no international system that governed the implementation of search and rescue operations.⁶⁵ This led to uneven results, with some areas that provided prompt and thorough operations and others where there were no search and rescue services at all.⁶⁶ Each country coordinated its own services, and standards and resources varied.⁶⁷

The SAR Convention requires parties, either individually or in cooperation with other states, to participate in the development of search and rescue services to ensure that assistance is rendered to persons in distress at sea.⁶⁸ The basic elements of a search and rescue service are a legal framework, responsible authority, organization of available resources, communication facilities, coordination and operational functions, and finally, processes designed to improve the service which include planning, domestic and international cooperation, and training.⁶⁹ Parties are then required to ensure that assistance is provided to any person in distress at sea, regardless of nationality, status, or circumstances.⁷⁰

The SAR Convention further requires that parties coordinate their search and rescue organizations and operations domestically and, when necessary, with neighboring states.⁷¹ The SAR Convention was designed to provide the general framework for search and rescue operations with the ultimate responsibility on states to develop cooperative agreements.⁷²

D. *The United Nations Convention Relating to the Status of Refugees*

A refugee⁷³ is defined by the 1951 United Nations Convention relating to the Status of Refugees ("Refugee Convention") as a person who:

Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social

⁶³ LOSC, *supra* note 17, art. 98 (2).

⁶⁴ SOLAS, *supra* note 44, ch. V, reg. 10.

⁶⁵ *Shipping Emergencies—Search and Rescue and the GMDSS*, *supra* note 55, at 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ SAR Convention, *supra* note 57, art. 2.1.1.

⁶⁹ *Id.* art. 2.1.2.

⁷⁰ *Id.* art. 2.1.10.

⁷¹ *Id.* art. 3.1.1.

⁷² *Shipping Emergencies—Search and Rescue and the GMDSS*, *supra* note 55, at 3.

⁷³ For a more thorough analysis of the refugee issues as they pertain to the *Tampa* case, see Peyser, *supra* note 20, at 446-457.

group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.⁷⁴

Norway and Australia, in addition to 135 other states, are parties to the Refugee Convention.⁷⁵ Norway is an original signatory and Australia entered by accession in 1954.⁷⁶ Indonesia, however, is not a party to this convention.⁷⁷

Merely meeting the above definition does not ensure that refugee status will be granted.⁷⁸ In fact, most persons loosely described as "refugees" are actually classified as "migrants."⁷⁹ In order to obtain refugee status, a migrant must both apply for and receive asylum.⁸⁰ The rescued passengers aboard the *Tampa* were seeking refugee status in Australia.⁸¹

When migrants, such as the *Tampa* passengers, are rescued by a ship and taken aboard, they come under the jurisdiction of the flag state, in this case Norway.⁸² The flag state is under no obligation to grant asylum, nor is there any binding international convention that specifically covers the duties regarding migrants on ships.⁸³ Generally, these migrants are disembarked at

⁷⁴ United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, art. 1(A)(2) (entered into force Apr. 22, 1954) [hereinafter Refugee Convention], available at <http://untreaty.un.org>; United Nations Protocol to the Convention Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 6224(E), 6230(F), 606 U.N.T.S. 267, art. 1(2) (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol], available at <http://untreaty.un.org>. The 1967 Protocol incorporated the "well-founded fear" definition of the 1951 Refugee Convention's Article 1, but eliminated the "time and place" limitations. KAREN MUSALO, JENNIFER MOORE, & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY* 57 (2002). States Parties to the 1967 Protocol also agreed to be bound by Articles 2-34 of the 1951 Convention. *Id.*

⁷⁵ United Nations Treaty Collection, List of Participants of the Convention relating to the Status of Refugees [hereinafter List of Participants], available at <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm> (last visited Feb. 25, 2002).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ For a more detailed discussion of the process by which a migrant is granted asylum, see Peyser, *supra* note 20 at 450-52.

⁷⁹ *Migrants at Sea*, SIGNALS SPECIAL NO.7, Sept. 2001, (North of England P & I Association Limited), at 1 [hereinafter *Migrants at Sea*], available at <http://www.nepia.com/News/Press/Special7.pdf>.

⁸⁰ *Id.* at 1.

⁸¹ For a discussion of the Australian domestic laws pertaining to refugees and asylum seekers, see Peyser, *supra* note 20 at 446-48. Australian law distinguishes refugees from asylum seekers and establishes a preference for offshore grants of refugee status over spontaneous arrivals. *Id.*

⁸² LOSC, *supra* note 17, art. 94(1).

⁸³ *Migrants at Sea*, *supra* note 79, at 1. The distinction between stowaways and migrants is significant: "Stowaways board the ship without permission and with the intention of remaining on board undetected whereas these migrants board the ship with the knowledge and permission of the master However, this difference may not always help the ship operator and master when it comes to disembarking the migrants." *Id.* There is an existing treaty on stowaways, the International Convention Relating to Stowaways, *reprinted in* 6 BENEDICT, *supra* note 17, Doc. No. 2-4 [hereinafter Stowaway Convention].

the next port of call; however, a captain has discretion that may allow him to determine an alternate destination according to the circumstances.⁸⁴

IV. A SHIPMASTER'S DUTIES

A shipmaster is subject to duties arising out of public international law and private obligations. Among these are the duty to rescue, duty to the ship owner, duty to the cargo owner, and duty to his crew.

A. *International Legal Obligations*

The duty of shipmasters to rescue passengers in danger or distress is one of the "traditional hallmarks of the law of the sea."⁸⁵ This duty arises under customary international law and is also expressly reflected in both the LOSC and SOLAS, which recognize this duty to rescue as a practical response to the dangers of the high seas.⁸⁶ While, generally, public international law binds only states, the duty imposed on a shipmaster to rescue passengers at sea is a rare instance in which public international law imposes a duty on an individual; the enforcement of this duty is left to the implementing legislation of the flag state.⁸⁷ The Flag State is obligated to enforce this duty and if the master fails to act in accordance with this duty, it is then the duty of the Flag State to enforce.⁸⁸

This treaty was drafted in 1957, but has not entered into force. *Id.* The Convention would have provided that the master of the ship shall "deliver the stowaway to the appropriate authority at the first port in a Contracting State at which the ship calls after the stowaway is found." *Id.* art. 2. Under the Convention, the port state then would have had the option, in descending order of preference, of sending the stowaway back to the state of origin, back to the port where he boarded, back to the last port of call, or to the flag state. *Id.* art. 3. However, the guidelines promulgated by the IMO in 1997 clarify that "stowaway asylum seekers should be treated in compliance with international protection principles as set out in international instruments and relevant national legislation." International Maritime Organization, *Guidelines on the Allocation of Responsibilities to Seek The Successful Resolution of Stowaway Cases*, International Maritime Organization Res. A.871(20), reprinted in 6 BENEDICT, *supra* note 17, Doc. No. 2-4A. For additional information on the problems of stowaways, see Beate Anna Ort, Comment, *International and U.S. Obligations Toward Stowaway Asylum Seekers*, 140 U. PA. L. REV. 285, 348-49 (1991).

⁸⁴ See Guidelines for the Disembarkation of Refugees, United Nations High Commissioner for Refugees, (Apr. 1988), reprinted in 6C BENEDICT, *supra* note 17, Doc. No. 13-8 (providing that when a vessel picks up refugees at sea, it should normally proceed to the first scheduled port of call, but suggesting that there may be instances in which another port would be appropriate).

⁸⁵ Bernard H. Oxman, *Chapter 4 Question of Ocean Law: Article: Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399, 414 (1997).

⁸⁶ *Id.*

⁸⁷ LOSC, *supra* note 17, art. 98(1) (requiring the flag state to enforce the shipmaster's duty to rescue); SOLAS, *supra* note 44, art. 1 (requiring states party to SOLAS to pass laws implementing its provisions).

⁸⁸ *Id.*

1. *LOSC and the Duty to Rescue*

Under the United Nations Convention on the Law of the Sea, states have an obligation to ensure that captains of ships flying their flag answer distress calls and render assistance. Article 98(1) of the LOSC provides:

Every state shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers . . . to render assistance to any person found at sea in danger of being lost . . . and to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may reasonably be expected of him.⁸⁹

Both Australia and Norway have given effect to this obligation through national laws.⁹⁰ A shipmaster who fails to assist, as prescribed by the LOSC Article 98, when he has a duty to render assistance could face criminal or administrative penalties provided by his state's implementing legislation, if his flag state discovers he has ignored a distress call.⁹¹

2. *SOLAS and the Duty to Rescue*

The SOLAS Convention similarly requires shipmasters to render assistance.⁹² Chapter V, Regulation 10(a) of SOLAS provides:

⁸⁹ This language is nearly identical to its precursor, Article 12 of the Convention on the High Seas, *supra* note 33.

⁹⁰ SOLAS, *supra* note 44, art. I, requires that contracting governments undertake to give effect to the SOLAS Convention by promulgating laws, decrees, orders, regulations and to take other steps "which may be necessary to give the present Convention full and complete effect, so as to ensure that, from the point of view of safety of life, a ship is fit for the service for which it is intended. Article III requires contracting governments to deposit at the IMO the text of these laws. See Navigation Act, 1912 (Austl.), § 317a (requiring the master to render assistance to any person if he can do so without serious danger to his ship, crew, or passengers, even if that person is an enemy, and backing the failure to comply with a \$20,000 penalty, ten years in prison, or both). See also Maritime Act, 1994 (Nor.). Section 135 imposes a duty on masters to give all possible and necessary assistance to any person in distress at sea or threatened by danger at sea if he can do so without serious risk to the ship or those on board. *Id.* Section 164 obliges shipmasters to render assistance to the other ship and its crew and passengers to rescue them from danger arising from a collision. *Id.*

⁹¹ For example, in the United States there are criminal sanctions under 46 U.S.C. § 2304 (1994). Section 317a of the Australian Navigation Act, *supra* note 90, also provides for criminal penalties.

⁹² SOLAS, *supra* note 44, ch. V., reg. 10(a). The obligation to render assistance was also present in The Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658 (entered into force on Mar. 1, 1913)[hereinafter Brussels Salvage Convention], *reprinted in* 6 BENEDICT, *supra* note 17, Doc. No. 4-1. Article 11 of the Brussels Salvage Convention provides that "every master is bound, so far as he can do so without serious danger to his vessel, her crew, and her

The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service, that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress and, taking into account the recommendations of the Organization, inform the appropriate search and rescue service accordingly.⁹³

The SOLAS Convention requires that masters go to the assistance of persons in distress at sea except as otherwise prescribed by Regulation 10(a). Failure to do so would expose the shipmaster to the penalties established in his state's implementing laws.

The LOSC and SOLAS make it clear that the duty to rescue applies to "any person" regardless of their individual status.⁹⁴ Failure to render assistance to migrants, or anyone else, would subject the shipmaster to sanctions by the flag state.⁹⁵ Thus, Captain Rinnan was required by both SOLAS and the LOSC to rescue the passengers from the sinking vessel, and did so in spite of the danger to his ship, its cargo, and his crew and regardless of the passengers' individual status.

passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost. The owner of the vessel incurs no liability by reason of contravention of the above." *Id.* This was in place nearly two years before the devastating sinking of the *Titanic*. SOLAS: *The International Convention for the Safety of Life at Sea, 1974*, *supra* note 4, at 1.

⁹³ SOLAS, *supra* note 44, ch. V., reg. 10(a).

⁹⁴ The language of the Brussels Salvage Convention further clarifies this obligation by providing that the duty is to "render assistance to everybody, *even though an enemy*, found at sea in danger of being lost" (emphasis added). Salvage Convention, *supra* note 92, art. 11. See also SAR Convention, *supra* note 57, art. 2.1.10 (requiring assistance to be provided *regardless of the nationality or status* of persons to be rescued or the circumstances in which that person is found) (emphasis added).

⁹⁵ LOSC, *supra* note 17, art. 98(1) and SOLAS, *supra* note 44, ch. V, reg. 10. See also *Migrants at Sea*, *supra* note 79, at 2.

B. *Private Obligations of a Shipmaster*

In addition to the duties imposed by public international law, a shipmaster also has private obligations to the ship owner, the shipper, the consignee, and the crew.

1. *Duty to the Owner of the Ship*

A shipmaster, in addition to his duty to render assistance and rescue under the LOSC and SOLAS, also owes a duty to the vessel owner. The *Tampa* is a 44,000-ton roll-on/roll-off containership (commonly referred to as a "ro-ro").⁹⁶ According to Wallenius Wilhelmsen, the Norwegian-based shipping company who owns the *Tampa* and seventy other vessels, the *Tampa* is worth approximately U.S. \$80 million.⁹⁷ Wallenius Wilhelmsen was forced to hire two freighters to replace the *Tampa* during its weeklong delay.⁹⁸ In addition, the owners also suffered losses incurred while diverting the ship for the rescue, provisioning it, and running it while it was waiting off Christmas Island.⁹⁹ This incident was quite costly¹⁰⁰ to Wallenius Wilhelmsen, a fact that could influence a less responsible firm to act less honorably.¹⁰¹

A shipmaster also has a duty to the shippers and consignees. The *Tampa*, en route from Fremantle,¹⁰² Australia to Singapore, was carrying

⁹⁶ *Containership Tangled in Refugee Controversy*, *supra* note 9.

⁹⁷ "The price of a new vessel of that type would be almost US \$80 million (A \$151 million), and when you add the cargo that's aboard, well, that's quite a business." Simon Mann, *Veteran Skipper's Compassion Lands Him in Troubled Waters*, AGE, Aug. 30, 2001, at 3, available at 2001 WL 25934441.

⁹⁸ Fyfe & Farouque, *supra* note 16.

⁹⁹ Michael Richardson, *In Migrants' Plight, a Sea Of Trouble for Skippers Australian Case Shows Rescues Can Be Costly*, INT'L HERALD TRIB., Sept. 6, 2001, at 1, available at 2001 WL 4857995.

¹⁰⁰ Although costly, under the protection and indemnity ("P & I") insurance system, multiple ship owners collectively share the costs of rescue operations and P & I rules specifically cover the costs of proceeding to the assistance of persons in distress. *Migrants at Sea*, *supra* note 79, at 1. In addition, on request, the UNHCR will reimburse ship owners for the subsistence of refugees on board ship and other expenditures arising as a direct result of rescue can be claimed. Guidelines for the Disembarkation of Refugees, *supra* note 84. The Guidelines provide that Claims should be directed to the appropriate P & I Club which will examine and forward them to UNHCR or if a ship owner does not belong to a P & I Club, claims may be submitted directly to the UNHCR Headquarters. *Id.*

¹⁰¹ Richardson, *supra* note 99. It is estimated that the delay cost the ship owners several hundred thousand dollars. *Id.*

¹⁰² Fremantle is a port city in Western Australia near Perth.

steel pipes, food, and forestry products,¹⁰³ a cargo valued at approximately U.S. \$20 million.¹⁰⁴

Additionally, domestic laws in the coastal state may imperil a ship owner's and cargo owner's interests. In this case, Captain Rinnan was threatened with the full weight of the Australian Migration Act,¹⁰⁵ generally reserved for people smugglers and ships flying without a flag, unless he turned back to Indonesia.¹⁰⁶ The penalties for violations of the Migration Act include significant fines and imprisonment of "facilitators" for up to twenty years.¹⁰⁷ Moreover, once the passengers are taken into custody, the shipping line has to pay for their transport, maintenance, detention, and deportation.¹⁰⁸ That ship captains may have liability under domestic law for acts taken in compliance with international law imposes an additional duty on shipmasters. Ship captains must be knowledgeable about domestic laws, not just at their ports of call, but throughout the regions in which they travel, so they do not inadvertently jeopardize their own interests or those of the ship owner.

2. *Duty to his Crew*

Perhaps most importantly, the shipmaster has a duty to his crew. The *Tampa*, a cargo ship, was suddenly well in excess of its capacity.¹⁰⁹ A cargo ship is "any ship which is not a passenger ship."¹¹⁰ A passenger ship is "a ship which carries more than twelve passengers."¹¹¹ A passenger is every person other than the master or the members of the crew or a child under one year of age.¹¹² Since the *Tampa* is a cargo ship, it was not authorized to carry more than twelve passengers.

The seaworthiness of a ship on the high seas is determined by the laws of the flag state.¹¹³ Captain Rinnan and the owners of the *Tampa*, Wallenius

¹⁰³ Yeoh En-lai, *Skipper—I'll Do It All Again*, STRAITS TIMES (Singapore), Sept. 7, 2001, available at 2001 WL 26055516.

¹⁰⁴ Fyfe & Farouque, *supra* note 16.

¹⁰⁵ Migration Act, 1958 (Austl.).

¹⁰⁶ Marr & Wilkinson, *supra* note 6.

¹⁰⁷ Migration Act, *supra* note 105, § 232A.

¹⁰⁸ *Id.* § 213.

¹⁰⁹ John Parker, *What About Safety?* TRAFFIC WORLD MAG., Sept. 10, 2001, available at 2001 WL 27563192.

¹¹⁰ SOLAS, *supra* note 44, ch. I, reg. 2(g).

¹¹¹ *Id.* ch. I, reg. 2(f).

¹¹² *Id.* ch. I, reg. 2(e).

¹¹³ LOSC, *supra* note 17, art. 92(1) provides, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." *Id.* Article 94(3)(a) provides "Every State shall take

Wilhelmsen, had declared the ship unseaworthy under Norwegian law¹¹⁴ because it was not certified to carry hundreds of passengers.¹¹⁵

The *Tampa*'s rescue mission was in itself heroic, albeit certainly risky for its crew. The first officer of the *Tampa*, Christian Maltau, had to "leap between the two vessels during the rescue, with the stricken Indonesian boat bouncing wildly."¹¹⁶ The crew converted empty containers into makeshift shelters, with one serving as a hospital and another serving as a toilet, further exposing themselves and their new passengers to unsanitary conditions and illness.¹¹⁷ Many of those rescued passengers were suffering from severe dehydration, dysentery, scabies, and other illnesses that put the crew at risk.¹¹⁸

The crew's physical security could also have been at risk. The Strait of Malacca,¹¹⁹ in the same region where the *Tampa* made its rescue, is notorious for widespread piracy. The pirates often pose as fishermen and take crew members by surprise.¹²⁰ Although for most the notion of pirates recalls images of bearded bandits with eye-patches, the practice of piracy is thriving in some parts of the world; in fact, the number of attacks reported in 2000 totaled 471, representing an increase of 52% over 1999.¹²¹ Because of this risk of pirate attack, Captain Rinnan was taking a chance by honoring his duty to rescue.

Although these migrants were not pirates, the rescued passengers did exert substantial pressure on Captain Rinnan to complete their voyage to Christmas Island. Captain Rinnan said that when he began to head back towards Indonesia, five representatives of the refugees stormed onto the bridge. He explained:

such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: (a) the construction, equipment and seaworthiness of ships." *Id.*

¹¹⁴ The *Tampa* only had safety equipment for thirty people, a fact which led Norway to determine the *Tampa* to be in violation of SOLAS. SOLAS, *supra* note 44, ch. III: Regulation 31 requires that lifeboats be carried to accommodate all persons on board and Regulation 32 lists requirements for carriage of lifejackets. *Id.* ch. III, regs. 31-32.

¹¹⁵ Fyfe & Farouque, *supra* note 16. See SOLAS, *supra* note 44, ch. I, reg. 2.

¹¹⁶ Steven Gutkin, *Man Who Saved Refugees Disappointed*, AP ONLINE, Sept. 6, 2001, available at 2001 WL 27334360.

¹¹⁷ *Id.*

¹¹⁸ Ham & Walker, *supra* note 18.

¹¹⁹ The Strait of Malacca is a narrow passage of shallow waters that forms the main route between the Indian and Pacific oceans through the Indonesian archipelago between the island of Sumatra and Singapore. THE EYEWITNESS ATLAS OF THE WORLD (David R. Green ed., 1994).

¹²⁰ BIMCO, Seascapes "Piracy and Armed Robbery Against Ships," at http://www.bimco.org/seascapes/0901/sea_view1.asp (last visited Feb. 25, 2002).

¹²¹ *Id.*

They were talking in a highly aggravated and threatening manner in my face They told me if I started heading out to sea again, they will jump overboard. They didn't threaten to take command. They were threatening to jump. But we also felt threatened for our lives. For the safety of the survivors and my crew, we had to turn around and head for Christmas Island. The tension was growing every day on board. We were in a lot of stress. We were very lucky to get out of the situation.¹²²

Moreover, AusSAR initially told Captain Rinnan that ultimately, as master, he would be given discretion as to where to bring the refugees.¹²³ In light of the circumstances, Captain Rinnan chose to bring them to the closest port, Christmas Island. Sometime later, the Australian government changed its mind and attempted to force the *Tampa* to head back towards Indonesia. Instead of expressing gratitude for having carried out a rescue mission according to their direction, the Australian government treated him as if he had orchestrated an illegal people smuggling operation, threatening him with penalties under the Australian Migration Act.

V. DUTIES OF STATES

Conventions are the clearest expressions of the legal rights and duties of states.¹²⁴ Any duty provided by treaty that is imposed on a state must be based on consent.¹²⁵ International agreements may also lead to the creation of customary international law when the agreement is widely accepted.¹²⁶ Customary law is the result of general and consistent practice by states that is followed by them out of a sense of legal obligation.¹²⁷ Customary law is, in principle, binding on all states.¹²⁸ The duties of a shipmaster in rescuing passengers at sea are well-recognized in both treaty law and customary law.¹²⁹ International law also imposes duties on flag states, states through

¹²² Barbie Dutter, *Australia Let Us Down, Says Captain of Refugee Ship*, DAILY TELEGRAPH (London), Sept. 7, 2001, at P19, available at 2001 WL 26940342.

¹²³ Marr & Wilkinson, *supra* note 6.

¹²⁴ CHURCHILL & LOWE, *supra* note 34, at 6.

¹²⁵ See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (recognizing the sovereign equality and the independence of all states). Each state possesses the capacity to consent to be bound. *Id.* art. 6.

¹²⁶ See RESTATEMENT, *supra* note 31, § 102(3) & cmts. f-g.

¹²⁷ *Id.* § 102(2) & cmt. c.

¹²⁸ An exception to this rule is if a state persistently objects. CHURCHILL & LOWE, *supra* note 34, at 8; RESTATEMENT, *supra* note 31, § 102(2) & cmt. c.

¹²⁹ *Supra* Part IV.A.

which migrants transit, and coastal states. In this case, Norway, as the flag state, Indonesia, as the transit state, and Australia, as a coastal state, may all have duties under international law. However, what these duties are and when they apply is unclear. In the case of the *Tampa*, the law is unsettled as to what must be done about these rescued passengers once the shipmaster has fulfilled his duty.

A. *Obligations of the Flag State*

Under international law, Norway has duties to ships flying its flag.¹³⁰ Those duties include ensuring that ships flying the Norwegian flag act in compliance with international obligations.¹³¹ Flag states have the responsibility of enforcing the duties to rescue under SOLAS,¹³² the LOSC,¹³³ and the SAR Convention.¹³⁴ Norway, as the flag state, also has exclusive jurisdiction on the high seas under Article 92 of the LOSC.¹³⁵ Article 94(1) provides that the duties of the flag state are to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."¹³⁶ Paragraph 2 provides that the state generally shall maintain a register of ships flying its flag and assume jurisdiction under its internal law over each ship flying its flag, including the master, officers and crew.¹³⁷ The first two paragraphs of Article 94 impose general obligations on the flag state. The third paragraph, however, obliges the state to create and enforce safety measures for ships flying its flags:

Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:

- (a) the construction, equipment and seaworthiness of ships;

¹³⁰ Norway has a longstanding maritime tradition and is the fourth largest maritime power in the world, despite its relatively small size and population. Marr & Wilkinson, *supra* note 6.

¹³¹ LOSC, *supra* note 17, art. 94; see also RESTATEMENT, *supra* note 31, § 502(1) (providing that flag states are required to exercise effective authority and control over the ship in administrative, technical and labor matters; take such measures to ensure safety at sea; and adopt laws and regulations to conform these measures to generally accepted international standards, regulations, procedures, and practices, and secure their implementation and observance).

¹³² SOLAS, *supra* note 44, ch. V, reg. 10.

¹³³ LOSC, *supra* note 17, art. 98.

¹³⁴ SAR Convention, *supra* note 57, art. 2.1.10.

¹³⁵ LOSC, *supra* note 17, art. 92.

¹³⁶ *Id.* art. 94(1).

¹³⁷ *Id.* art. 94(2).

- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.¹³⁸

Paragraph 4 details specific safety standards for ships, masters, and crew.¹³⁹ Paragraph 5 provides, "In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."¹⁴⁰ Paragraphs 6 and 7 provide steps for other states to take if a flag state has violated its duties under this provision.¹⁴¹

When any state fails to comply with an international obligation, an injured state may seek a remedy either by submitting the case to the International Court of Justice¹⁴² or by resort to other methods prescribed by the relevant treaty.¹⁴³ Norway discharged its duty when Captain Rinnan rescued the stranded passengers at sea. The Norwegian Ambassador to Australia, Ove Thorsheim, clarified, "The Norwegian position is that we

¹³⁸ *Id.* art. 94(3).

¹³⁹ The state is required to ensure that charts, navigational equipment, and safety instruments are on board; that the master and officers of the ship have adequate qualifications and training; and that the master and officers understand the international regulations concerning the safety of life at sea, the prevention of collisions, the prevention and control of maritime pollution, and the maintenance of communications by radio. *Id.* art. 94(4).

¹⁴⁰ *Id.* art. 94(5).

¹⁴¹ *Id.* art. 94(6) (flag state's duty to investigate and if appropriate take action to remedy); art. 94(7) (requiring collision investigations if flag state ship is involved in a collision and results in the loss of life; serious personal injury; or serious damage to nationals, ships, or installations of another state or the marine environment).

¹⁴² The International Court of Justice ("ICJ") was set up under the original UN Charter in 1945. ICJ Statute, *supra* note 31, art. 1. Parties accepting jurisdiction of the International Court of Justice may submit disputes relating to interpretation or application of international conventions to the ICJ. *Id.* art. 35. Since Norway has accepted jurisdiction of the ICJ, if it had breached its obligations as a flag state, submission to the ICJ for dispute resolution by an injured state would have been appropriate. *Id.* Only states may be parties in cases before the Court, so individuals may not refer claims to the ICJ. *Id.* art. 34.

¹⁴³ Article 279 of LOSC, *supra* note 17, requires that States Parties settle disputes peacefully in accordance with article 2, paragraph 3 of the U.N. Charter. Where there has been no resolution, Article 286 of LOSC requires that the dispute be submitted, at the request of any party to the dispute, to a court or a tribunal with jurisdiction and Article 287 defines those tribunals. The four options under Article 287 are: (a) the International Tribunal for the Law of the Sea (established in accordance with Annex VI); (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; or (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

have fulfilled all our obligations that we have rescued the people and brought them to the closest harbour.”¹⁴⁴

B. *Obligations of the Transit State*

Indonesia, perhaps, was best situated to prevent the *Tampa* incident entirely, being both the through which the migrants transited and the state of origin of the crew of the ferry. As a party to SOLAS,¹⁴⁵ Indonesia has a duty to ensure the safety of its ships, and thus had a duty to prevent its dilapidated and dangerous ferry from sailing, a duty all the more important because it was a passenger vessel carrying over four hundred passengers.¹⁴⁶ Indonesia may also owe a duty by virtue of the fact that Indonesian nationals were also rescued by the *Tampa* and the imperiled vessel was of Indonesian origin.

Initially, Indonesia recognized its responsibility under international law and granted permission for the *Tampa* to bring the refugees to the port city of Merak.¹⁴⁷ However, once it was clear that the rescued passengers would be heading to Australia instead, it withdrew its offer. The Indonesian Foreign Minister Hassan Wirajuda denied responsibility, claiming:

Indonesia is not in any way responsible, simply because they are under good protection of the Norwegian ship and will be under Norwegian law And in fact . . . they are aboard a ship to go to Australia. So let [Australia] deal with it. Indonesia, no matter of what, is not involved. For that matter, I don't think it is in our interest to land the ship in Indonesia.¹⁴⁸

However, in spite of the Indonesian Foreign Minister's position, the widespread people-smuggling operations in Indonesia clearly have an effect transcending Indonesia's national borders.¹⁴⁹

¹⁴⁴ Hamish McDonald & Sarah Crichton, *We've Done All We Can, Says Norway's Shuttle Diplomat*, SYDNEY MORNING HERALD, Sept. 1, 2001, at 1, available at 2001 WL 26254860.

¹⁴⁵ *Summary of Status of Conventions*, *supra* note 54.

¹⁴⁶ SOLAS, *supra* note 44, art. I.

¹⁴⁷ Permission was given by the Indonesian Search and Rescue Authority. Marr & Wilkinson, *supra* note 6.

¹⁴⁸ Minister Wirajuda is quoted in *Asylum Seekers Aboard Ship Face Deteriorating Health*, ASIAN POL. NEWS, Sept. 3, 2001, available at 2001 WL 25561227.

¹⁴⁹ See Protocol Against the Smuggling of Migrants by Land, Air and Sea, opened for signature Dec. 15, 2000, U.N. Doc. A/55/383 (2000) [hereinafter People Smuggling Protocol], available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf; see also United Nations Convention Against Transnational Organized Crime, opened for signature Dec. 15, 2000, U.N. Doc. A/55/383 (2000) [hereinafter Organized Crime Convention] available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf. These

These people-smuggling operations¹⁵⁰ begin in refugee camps in Pakistan, Iran, or elsewhere, where official refugee processing is slow.¹⁵¹ They are recruited from these camps by smugglers who often have a travel agent's license and senior contacts among authorities.¹⁵² Refugees bound for Australia board flights to Jakarta, Kuala Lumpur, or Singapore.¹⁵³ Most refugees ultimately transit through Indonesia, where they board antiquated fishing boats or inter-island ferries like the *KM Palapa 1*, bound for Australia's coast.¹⁵⁴ Because of the incentives for countries like Indonesia to encourage migrants transiting through their borders to depart for their final destinations, international agreements addressing people-smuggling are perhaps the best solution to combat the problem.¹⁵⁵

C. *Obligations of the Coastal State*

While Australia's actions in refusing to allow the *Tampa* to offload its passengers may have been objectionable under humanitarian standards, it is not clear whether Australia violated international legal obligations as a

may be appropriate instruments to decrease the incidence of people-smuggling, but neither has entered into force. *Signatories to the U.N Convention Against Transnational Organized Crime and its Protocols*, http://www.odccp.org/crime_cicp_signatures.html. The People Smuggling Protocol is intended to combat smuggling and protect human rights of smuggled migrants. See People Smuggling Protocol, art. 3. The Organized Crime Convention and the People-Smuggling Protocol set basic minimum standards for domestic legislative implementation, with the overarching goal being the elimination of "safe havens" where organized crime thrives. Summary of the United Nations Convention Against Transnational Organized Crime and Protocols Thereto, available at <http://www.odccp.org> (last visited Feb. 25, 2002). Not surprisingly, the most contentious provision of the People Smuggling Protocol is Article 15, which addresses the return of migrants. *Id.* Countries that are destinations for illegal migrants, such as Australia, support a provision which would allow them to return migrants to countries of which they are nationals or where they have a legal right of abode; countries that are more often a source country of migrants support the right for migrants to remain, or at a minimum a right to seek legal status in destination countries. *Id.*

¹⁵⁰ People-smuggling is not restricted to the Indian or Pacific Oceans. See Ocean Report to the Secretary General, *supra* note 3 and accompanying text.

¹⁵¹ Brian Toohey, *Basic Human Rights Lost at Sea*, AUSTRL. FIN. REV., Sept. 1, 2001, at 24, available at 2001 WL 21626184. See generally Simon Elegant, *Shipwrecked: Tens of Thousands of Refugees are Trafficked by Smugglers Every Year. For Many, the Trip is Fatal*, TIME (Int'l ed.), Nov. 5, 2001, at 45 (providing details about the people-smuggling industry in southeast Asia).

¹⁵² Rory McCarthy, John Aglionby & Patrick Barkham, *Asylum Crisis: The Voyage: Hazardous, Long and Costly: The Refugees' Lonely Odyssey: Only the Smugglers Are Certain Winners in the Escape Business*, GUARDIAN (London), Sept. 1, 2001, available at 2001 WL 26945905.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See People-Smuggling Protocol, *supra* note 149, and accompanying text. Indonesia, incidentally, is not a signatory to the 1951 U.N. Convention relating to the Status of Refugees or its 1967 Protocol. List of Participants, *supra* note 75. It has, however, signed both the Organized Crime Convention and the People-Smuggling Protocol, although it has yet to ratify either. *Signatories to the U.N Convention Against Transnational Organized Crime and its Protocols*, *supra* note 149.

coastal state.¹⁵⁶ Article 98(2) of the LOSC requires that every coastal state promote the establishment, operation, and maintenance of an adequate and effective search and rescue service.¹⁵⁷ Additionally, Chapter V, Regulation 15 of SOLAS requires each contracting government to ensure that necessary arrangements are made for watching its coasts and for the rescue of persons in distress at sea.¹⁵⁸ The SAR Convention provides the mechanism for implementation of these duties under the LOSC and SOLAS.¹⁵⁹ The acts of Australia's AusSAR, which initially requested that the *Tampa* attempt the rescue, comply with this obligation.

1. Duties of Coastal States Under the LOSC

The duties of coastal states are enumerated in Article 24 of the LOSC, which provides:

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:
 - (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
 - (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.¹⁶⁰

Article 18 defines "passage" as being navigation through the territorial sea without calling on a port or to or from a port.¹⁶¹ It further conditions passage on being continuous and expeditious, but allows stopping and anchoring "only in so far as the same are incidental to ordinary navigation or are

¹⁵⁶ The sovereignty of a coastal state extends to an adjacent belt of sea, called the territorial sea. LOSC, *supra* note 17, art. 2; *see also* White, *supra* note 5, at 6.

¹⁵⁷ LOSC, *supra* note 17, art. 98(2).

¹⁵⁸ SOLAS, *supra* note 44, ch. V, reg. 15.

¹⁵⁹ SAR Convention, *supra* note 57, art. 2.1.1.

¹⁶⁰ LOSC, *supra* note 17, art. 24.

¹⁶¹ *Id.* art. 18.

rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”¹⁶²

Under Article 19(1) passage is defined as being innocent “so long as it is not prejudicial to the peace, good order or security of the coastal State.”¹⁶³ However, Article 19(2) lists activities that shall be deemed prejudicial, including Article 19(g), which provides, “the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.”¹⁶⁴ Article 25 provides that “the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.”¹⁶⁵ Australia officials warned Captain Rinnan that, if he continued toward Australian soil, he would be liable for fines or imprisonment, penalties usually reserved for people smugglers.¹⁶⁶ Therefore, based on a strict reading of the LOSC, the *Tampa* entered Australian waters against Australia’s clear wishes. Thus, its passage was not innocent because it was carrying persons in violation of Australia’s immigration laws. Furthermore, Australia had a right to prevent passage that threatened its national security.¹⁶⁷

This textual reading of Australia’s obligations, while accurate, fails to account for both the contextual differences of the *Tampa* case as well as Australia’s potential obligations under other international instruments. Factually, this case is distinguishable from a situation in which a ship began its voyage with illegal migrants aboard with the intent of transporting them to an Australian port. Ironically, it was actually at Australia’s request that the *Tampa* found itself in this predicament. It was AusSAR who contacted the *Tampa* and requested that Captain Rinnan make the rescue, and it was AusSAR who initially approved the *Tampa*’s passage into Australian waters to offload its passengers.¹⁶⁸ Furthermore, Australia treated the rescued as

¹⁶² Technically, this duty to rescue does not apply expressly to the territorial sea; however, Professor Oxman articulated that:

[LOSC Article 18(2)] is not properly regarded as articulating a new right or the expansion of an existing right. It constitutes a recognition that a universal duty to rescue at sea has existed since time immemorial, that this duty has been respected without regard to changing views regarding the juridical status of the sea, and that this duty finds new support in modern international law in the increasing acceptance of humanitarian norms in state practice and conventional law.

Oxman, *supra* note 85, at 415.

¹⁶³ LOSC, *supra* note 17, art. 19(1).

¹⁶⁴ LOSC, *supra* note 17, art. 19(2)(g).

¹⁶⁵ *Id.* art. 25.

¹⁶⁶ Marr & Wilkinson, *supra* note 6.

¹⁶⁷ LOSC, *supra* note 17, art. 19(1) & (2)(g).

¹⁶⁸ Marr & Wilkinson, *supra* note 6.

asylum seekers and not as generic rescued passengers at sea, attempting to draw a legal distinction based on the status of passengers, a distinction that does not exist in either the LOSC or SOLAS.¹⁶⁹ Presumably, Australia's reaction to the *Tampa* would have been quite different had the rescued persons been affluent cruise ship passengers from Western Europe or the United States.

2. *Australia and the Refugee Convention*

There are also questions as to whether Australia complied with its international obligations as a party to the U.N. Convention relating to the Status of Refugees and its 1967 Protocol.¹⁷⁰ Article 33 of the Refugee Convention may impose additional responsibilities on Australia in this situation. Article 33 provides, "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁷¹ Key to this inquiry is whether the expulsion of the rescued passengers on the *Tampa* constitutes *refouling* in violation of Article 33.¹⁷² Since Australia's actions did not *per se* force the refugees back to a *territory* where their lives or freedoms were threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, then Australia's actions may not have constituted *refoulement* in the technical sense.¹⁷³ However, it was clear that at the climax of the standoff, with Indonesia standing firm in its refusal to accept responsibility for the migrants, the *Tampa* had nowhere to turn.

¹⁶⁹ SOLAS, *supra* note 44, ch. V, reg. 10; LOSC, *supra* note 17, art. 98(1).

¹⁷⁰ Refugee Convention and Protocol, *supra* note 74.

¹⁷¹ *Id.* art. 33.

¹⁷² Former High Commissioner for Refugees Legal Officer, Guy S. Goodwin-Gill stated:

Neither the law of the sea nor international refugee law gives clear guidance on landing rescued refugees, or on responsibility to determine their claims for refugee status. To refuse landing may not be the same as *refoulement*—the ship may sail on to a more hospitable port—but it is hardly conducive to any lasting solution.

Guy S. Goodwin-Gill, *Australia 'No' That Put Law All at Sea*, TIMES (London), Sept. 11, 2001, at LAW8, available at 2001 WL 4928939.

¹⁷³ For a discussion of other potential violations under the Refugee Convention, see Peyser, *supra* note 20, at 458-60.

3. *Vessels in Distress*

Under Chapter V, Regulation 15, pertaining to Search and Rescue, "Each contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts."¹⁷⁴ Once the *Tampa* signaled its distress, AusSAR had a duty to make "necessary arrangements" for the rescue of persons in distress.¹⁷⁵ However, it is not clear whether "necessary arrangements" entails allowing actual offloading of the passengers or minimizing the *force majeure* conditions by providing provisions and medical assistance, which Australia did.¹⁷⁶ In addition, its naval vessel was nearby and was available to mitigate any hazard to the *Tampa* or crew.¹⁷⁷ These actions by Australia may have been enough to constitute the "necessary arrangements" required under SOLAS for Australia to have acted in compliance with this duty.

Although SOLAS prescribes specific safety precautions to be taken by vessels, flag states, and coastal states under normal circumstances, Article IV is the applicable provision for *force majeure* conditions. Article IV of SOLAS specifically states, "Persons who are on board a ship by reason of *force majeure* or in consequence of the obligation laid upon the master to carry shipwrecked or other persons shall not be taken into account for the purpose of ascertaining the application to a ship of any provisions of the present Convention."¹⁷⁸

While Article IV is certainly relevant, it must be read in conjunction with Article V, which is more applicable to the *Tampa* situation. Article V prescribes procedures for the carriage of persons in an emergency:

- (a) For the purpose of evacuating persons in order to avoid a threat to the security of their lives a Contracting Government may permit the carriage of a larger number of persons in its ships than is otherwise permissible under the present Convention.
- (b) Such permission shall not deprive other Contracting Governments of any right of control under the present

¹⁷⁴ SOLAS, *supra* note 44, ch. V, reg. 15.

¹⁷⁵ *Id.*

¹⁷⁶ Fyfe & Farouque, *supra* note 16.

¹⁷⁷ White, *supra* note 5, at 5.

¹⁷⁸ SOLAS, *supra* note 44, art. IV(b).

Convention over such ships which come within their ports.

- (c) Notice of any such permission, together with a statement of the circumstances, shall be sent to the Secretary-General of the Organization by the Contracting Government granting such permission.¹⁷⁹

This provision contemplates removing safety restrictions that would otherwise be imposed by SOLAS Chapter III, following the rescue of imperiled persons at sea, thus in effect subordinating Chapter III to Chapter V, Regulation 10 of SOLAS.¹⁸⁰ It also explicitly provides that coastal states may maintain control over which ships are admitted to their ports.¹⁸¹

Arguably, Australia could contend that under SOLAS Article V(a), it was permitted for the *Tampa* to transport the passengers back to Indonesia. However, Article V(a) leaves the grant of permission to disregard SOLAS's safety provisions up to the discretion of the flag state, in this case Norway.¹⁸² A proper interpretation would be that a flag state may, in light of the circumstances, decide to lift the safety restrictions on its vessel in the best interest of the safety of the persons rescued at sea. Since Norway exercised its discretion by declaring its vessel unseaworthy,¹⁸³ the safety restrictions still applied. Australia's refusal to allow entry into its territorial waters for the purposes of allowing the *Tampa* to offload its passengers threatened the safety of the crew and passengers and was in violation of SOLAS, which requires vessels to have on board certain safety equipment relative to the number of people, among other things.¹⁸⁴ Australia's actions in forcing the *Tampa* to remain in international waters while so burdened by such a large number of people, for which it was neither designed nor equipped, disregarded these safety stipulations in both law and spirit.¹⁸⁵

These violations may have been justifiable since SOLAS Article V(b) explicitly recognizes the right of Australia to control ships that enter its territorial waters, even in an emergency.¹⁸⁶ Australia also has a right under

¹⁷⁹ SOLAS, *supra* note 44, art. V.

¹⁸⁰ *Id.* art. V(a).

¹⁸¹ *Id.* art. V(b).

¹⁸² *Id.* art. V(a).

¹⁸³ Determinations of seaworthiness are left to the shipmasters and owners and are governed by the laws and standards of the Flag State. LOSC, *supra* note 17, art. 94(2)(a).

¹⁸⁴ See SOLAS, *supra* note 44, ch. III, reg. 7. For specific requirements of passenger ships, see ch. III, regs. 21-30. For cargo ships, see ch. III, regs. 31-37. The *Tampa* is a cargo ship, which by definition, is only allowed to carry twelve passengers. *Id.* ch. I, reg. 2(e)-(g).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* art. V(b).

the SAR Convention to allow entry into its territorial waters.¹⁸⁷ Under the SAR Convention, "a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties."¹⁸⁸ However, the *Tampa* had already completed its "search" activities, and it is unclear whether "rescue" encompasses bringing the passengers to a port or just removing them from the immediate danger. The rescue coordination center appears to have a great deal of discretion in this matter. On the basis of "reliable information that a search and rescue operation has been successful, or that the emergency no longer exists, it shall terminate the search and rescue operation and promptly so inform any authority, facility or service which has been activated or notified."¹⁸⁹ It is conceivable that Australia considered the rescue operation to be successful once the passengers had been safely transferred onto the *Tampa* and thus acted legally in terminating the search and rescue operations and refusing to allow the *Tampa* to enter its territorial waters.

VI. THE IMO TO THE RESCUE?

A. *The IMO's Response to the Tampa Incident*

In response to the *Tampa* incident, the IMO passed an Assembly Resolution in its November 2001 session. Resolution A.920(22) on Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, instructs the IMO Maritime Safety Committee, the Legal Committee, and the Facilitation Committee to review all IMO instruments "for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies."¹⁹⁰ Those committees are further requested to take action so that:

Survivors of distress incidents are provided assistance regardless of nationality or status or the circumstances in which they are found; ships, which have retrieved persons in distress at sea, are able to deliver the survivors to a place of safety; and

¹⁸⁷ SAR Convention, *supra* note 57, art. 3.1.2.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* art. 4.8.3.

¹⁹⁰ Assembly Res. A.920(22) (Nov. 2001), § 1 (forthcoming, draft provided by IMO on file with the author).

survivors, regardless of nationality or status, including undocumented migrants, asylum seekers and refugees, and stowaways, are treated, while on board, in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.¹⁹¹

This resolution further requests that those committees take account of “the rules and principles of general international law with respect to the duty to render assistance to persons in distress at sea and to identify possible needs for codification and progressive development of these rules and principles.”¹⁹²

The issues of migrants and stowaways have been on the agenda at the IMO for several years.¹⁹³ The IMO, with its focus on safety, and particularly with its emphasis on safeguarding life at sea, is well situated to provide guidance and leadership in the development of substantive law to address the increasing problem of migrants at sea.

The review and the development of new law proposed by the resolution would be done in conjunction with other international organizations, such as the UNHCR.¹⁹⁴ In addition, the Secretary-General of the IMO, William O’Neil, suggested the establishment of a coordinating mechanism that would rely on international agencies working in cooperation “to ensure that the response of the United Nations in any future emergency can be co-ordinated in a consistent manner.”¹⁹⁵

B. Places of Refuge

Recent incidents have suggested the need to develop “places of refuge,” an issue being promoted by the Secretary-General of the IMO.¹⁹⁶ The emphasis on “places of refuge” follows a recent incident in which the

¹⁹¹ *Id.* 1.

¹⁹² *Id.* § 2.

¹⁹³ For a list of IMO resolutions and documents dealing with stowaways and migrants, as well as a bibliography of other useful resources, see Information Resources on Stowaways/Migrants, IMO Information Sheet No. 33, published by IMO Library Services, External Relations Office, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D4534/33INFSH-StowawaysMigrants.doc.

¹⁹⁴ *Id.* para. 10 (“noting the Secretary-General’s initiative to involve competent United Nations specialized agencies and programmes in the consideration of the issues addressed in this resolution for the purpose of agreeing on a common approach to resolve them in an efficient and consistent manner”).

¹⁹⁵ 22nd Assembly Agrees to Hold Maritime Security Conference in December 2002, http://www.imo.org/Newsroom/mainframe.asp?topic_id=144&doc_id=1747 (last visited Feb. 25, 2002).

¹⁹⁶ “Places of Refuge”—Action Plan Takes Shape, IMO NEWS, No. 3, 2001, at 6, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D3428?IMONews3.pdf.

fully laden tanker *Castor*, having been weather-beaten and suffering severe structural damage, was in need of a sheltered place to transfer its cargo and make repairs.¹⁹⁷ The Spanish maritime rescue service evacuated the crew but the *Castor* was kept at a distance from the coast of Spain.¹⁹⁸ Eventually the *Castor*, after being unable to find shelter off Algeria, was towed to the coast of Tunisia where the cargo was safely unloaded.¹⁹⁹

The call for "places of refuge" was prompted by recognition of the fact that leaving a distressed ship at sea may lead to potentially much greater damage than bringing such a ship to sheltered waters.²⁰⁰ In response to this call, the IMO's Sub-Committee on Safety of Navigation agreed to draft terms of reference for future work.²⁰¹ The suggested terms of reference include the preparation of guidelines for actions a master should take when in need of a place of refuge; the evaluation of risk associated with the provision of places of refuge; and actions expected of coastal states for the identification, designation and provision of such suitable places.²⁰² While the *Castor* itself was the cause of the crisis requiring port entry, the *Tampa*'s crisis was imposed on it. It is unclear whether the "places of refuge" guidelines will encompass situations like the *Tampa* incident where the immediate crisis is not potential environmental damage to coastal waters but rather an onslaught of migrants who did not enter through the proper channels.

VII. THE DUTIES OF SHIPMASTERS AND DUTIES OF COASTAL, FLAG AND TRANSIT STATES ARE UNBALANCED

The *Tampa* case underscores the asymmetry between the obligations to rescue persons at sea imposed on ships by the LOSC and SOLAS, on the one hand, and the lack of any corresponding obligation on coastal states to receive rescued persons on the other. What is clear is that it is not the responsibility of a shipmaster, confronted with an emergency that obligates him to effect a rescue of imperiled passengers, to make refugee status

¹⁹⁷ *Id.*

¹⁹⁸ *Castor Incident Highlights Plight of Disabled Ships: "Sheltered Waters" To Be Tackled As a Matter of Urgency*, IMO NEWS, No. 1, 2001, at 6, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D2220/issue12001.pdf.

¹⁹⁹ *Id.* at 7.

²⁰⁰ Hans-Jürgen Roos, *Ports of Refuge: Preparing Guidelines*, SEAWAYS, Feb. 2002, at 10.

²⁰¹ *Framework for IMO Work on Places of Refuge Developed*, IMO NEWS, No. 3, 2001, at 17, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D3428?IMONews3.pdf.

²⁰² *Id.*

determinations.²⁰³ Shipmasters are experts in seamanship, not refugee law. Repetition of an event like the *Tampa* incident is likely.²⁰⁴ The resistance of states to aid the shipmaster in the prompt offloading of passengers rescued in accordance with his duties could lead to reluctance among shipmasters to rescue distressed passengers and endanger the time-honored practice of saving persons at sea.²⁰⁵

In fact, a dangerous precedent for the failure to rescue already exists. One need look no further than the horrifying story of those refugees on the Voyage of the Damned. It was in response to the tragedy of the *St. Louis*, and other similar disasters, that Article 33 of the U.N. Convention Relating to the Status of Refugees prohibiting *refoulement* was drafted.²⁰⁶

In 1942, just a few years after the *St. Louis*, the *Struma*, a Greek boat filled with 769 Romanian Jews, left Constanta, Romania for Palestine.²⁰⁷ The *Struma* was unsafe, heavily overcrowded and without adequate sanitary facilities.²⁰⁸ Soon after the vessel left Romania, the engine began to falter and it was towed to the Istanbul harbor.²⁰⁹ Leaders from the United Kingdom, Romania, and Turkey argued for seventy days about what to do with the refugees.²¹⁰ Ultimately at an impasse, the Turkish government towed the *Struma* with its passengers six miles out from the coast and left it there, with no working engine, no food, no water, and no fuel.²¹¹ After the *Struma* had drifted for several hours, a Soviet torpedo hit and sank the

²⁰³ In response to this incident, the North of England P & I Association, has issued a special publication with cursory guidance on refugee law for shipmasters who may be confronted with a similar situation. *Migrants at Sea*, *supra* note 79.

²⁰⁴ See *Ocean Report to the Secretary General*, *supra* note 3 and accompanying text.

²⁰⁵ For a horrific account of the murder of stowaways discovered on the high seas, presumably so that the shipmasters would avoid the high fines imposed by their presence, see Elissa Steglich, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction*, 78 TEX. L. REV 1323 (2000). In one case, Romanian stowaways were summarily tossed overboard with only a makeshift raft and life vests into rough and cold waters. *Id.* Other stowaways were brutally stabbed to death by the Taiwanese captain and the officers, to the horror of the Filipino crew. *Id.* This incident is by no means isolated; other incidents include the massacre by Ukrainian soldiers of eight Ghanaians and a Cameroonian in 1992; 280 Indian, Pakistani and Sri Lankan immigrants who died either by drowning or after the small boat that they were forced onto by the Lebanese captain was split in two by a Honduran tanker in 1996; the murder of a Zairian stowaway on board a Turkish ship in 1997; and the killing of a Burundian stowaway who attempted to escape brutal beatings and enslavement aboard a Cypriot-flagged vessel. *Id.*

²⁰⁶ The Lowenstein International Human Rights Clinic, *supra* note 24, at 14.

²⁰⁷ Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 U.C. Davis J. Int'l L. & Pol'y 297, 316, (1995); Tara Burghart, *After Fifty-Nine Years, Lone Survivor Bears Witness to Atrocity*, L.A. TIMES, Jan. 21, 2001, at A1, available at 2001 WL 2454077.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

vessel.²¹² The Turks did not send out rescue boats until the next day and only one refugee was saved.²¹³

The mass exodus of Vietnamese refugees following the fall of South Vietnam provides a more recent example. Between 1975 and 1979, over 600,000 refugees had fled their homeland, many of them by boat.²¹⁴ In the spring of 1979, the departure rate reached 40,000 per month.²¹⁵ In response to these massive waves of migrants, countries in the region refused to allow them to land, resulting in thousands of deaths in the South China Sea from drowning, brutal pirate attacks, and starvation.²¹⁶

In June 1988, United States Navy Captain Alexander Balian, commanding officer of the U.S.S. *Dubuque*, discovered refugees in an overloaded and decrepit vessel in the South China Sea.²¹⁷ Although he offered them food and medicine, Captain Balian refused to allow them on board.²¹⁸ The Vietnamese refugees resorted to cannibalism to survive and ultimately died of starvation and dehydration after drifting at sea for more than a month.²¹⁹ Captain Balian was convicted by a military court martial of dereliction of duty for failing to rescue and failing to give adequate aid to the refugees drifting in the South China Sea.²²⁰

To address the Vietnamese refugee crisis, the UNHCR convened an international summit in 1989.²²¹ As part of this summit, a Comprehensive Plan of Action was drafted for dealing with these refugees in a humane way.²²² Under the plan, countries in the region must allow arriving asylum seekers to land and must provide them temporary refuge until final determination of their status can be made.²²³

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Yen Tran, Comment, *The Closing of the Saga of the Vietnamese Asylum Seekers: The Implications on International Refugees and Human Rights Laws*, 17 HOUS. J. INT'L L. 463, 468 (1995).

²¹⁵ *Id.* at 469.

²¹⁶ Arthur C. Helton, *The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control*, 8 N.Y.L. SCH. J. HUM. RTS. 111, 112 (1990).

²¹⁷ Jane Fritsch, *Balian Guilty in Viet Boat Case, to Get Reprimand*, L.A. TIMES, Feb. 24, 1989, at 1, available at 1989 WL 2333267.

²¹⁸ Jane Fritsch, *Balian Blames Many for the Derailment of His Navy Career*, L.A. TIMES, Feb. 25, 1989, at 1, available at 1989 WL 2332932.

²¹⁹ *Viet Boat Refugee Defends Killing and Cannibalism*, CHI. SUN-TIMES, Feb. 28, 1989, at 4, available at 1989 WL 5493043.

²²⁰ The six Navy captains who heard the case ordered that Balian be given a letter of reprimand, which is the mildest punishment possible. Fritsch, *supra* note 218.

²²¹ The 1989 International Conference on Indochinese Refugees: the Comprehensive Plan of Action was convened on June 13-14, 1989 in Geneva. Tran, *supra* note 214 at 477-480.

²²² *Id.*

²²³ *Id.* at 465 (citing Office for the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees, U.N. GAOR, 44th Sess., Annex, pt. II, U.N. Doc. A/44/523 (1989)).

VIII. LEGAL AND EXTRALEGAL SOLUTIONS

The problem of illegal migration by boat of asylum-seekers is not restricted to the Indian Ocean or Australia.²²⁴ The probability of future incidents highlights the need for clarification of the law and a plan for dealing with the widespread increase in refugee migration.²²⁵ There is a dire need for states to act quickly in the future in deciding a course of action in similar situations. What happened in the *Tampa* case is simply unacceptable. It is not the duty of a ship captain to determine the refugee status of persons rescued at sea; it is the job of policy makers and leaders of states. The LOSC and SOLAS impose an affirmative obligation on the shipmaster to rescue persons at sea. Captain Rinnan honored his duty under these conventions. However, because of the likelihood of increasing repetition of this scenario, governments should come together to close the existing gaps in international law so as to prevent protracted ad hoc decisions and alleviate the burden placed on Good Samaritans.

One possible solution has its roots in economics. By controlling both the supply of refugees and the demand for people-smuggling, it is possible to apply pressure to the "market" so as to restrict the flow of people smuggling. People smuggling is a serious issue with transnational consequences. The United Nations Convention Against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Air and Sea have the potential to reduce people smuggling.²²⁶ However, while the ratification and entry into force of these treaties may give the international community the legal instruments to punish those who engage in people smuggling, it is unclear what effect this will have on the supply or demand for these services. After all, Indonesian citizens are already subject to twenty-year prison sentences when they are caught smuggling people into Australia,²²⁷ and yet there is no shortage of people smugglers.²²⁸ Nor is it realistic to expect war-torn nations such as Afghanistan to remedy every human rights violation so as to decrease the amount of refugees fleeing its borders. As a

²²⁴ See *Ocean Report to the Secretary General*, *supra* note 3 and accompanying text.

²²⁵ *Id.*

²²⁶ The IMO's Maritime Safety Committee is specifically advocating for the ratification and entry into force of the Organized Crime Convention and the People Smuggling Protocol as a possible solution. *Trafficking or Transport of Illegal Migrants by Sea*, IMO NEWS, No. 1 2001, at 17, available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D2220/issue12001.pdf. The Baltic and International Maritime Council (BIMCO) also suggests this as a possible approach. *The Tampa*, BIMCO BULLETIN, Vol. 96, No. 5, 2001, at 54.

²²⁷ Migration Act, 1958, § 232A (Austl.).

²²⁸ See *Elegant*, *supra* note 151.

result, refugee claims must be processed in a timely manner to decrease the demand for people smuggling as a means to gain asylum.

Another possible solution has historical antecedents. Under the Comprehensive Plan of Action ("CPA") for the resettlement of Vietnamese refugees, first asylum countries agreed to provide temporary refuge to the Vietnamese, and in exchange, third countries agreed to resettle more refugees and Vietnam agreed to increase security measures to prevent illegal departures.²²⁹ The CPA combined the prevention of the migration of boat people from Vietnam with the resettlement of genuine refugees and repatriation of those not granted refugee status.²³⁰ A similar plan could be created in the wake of the crisis of refugees from nontraditional source countries transiting through Indonesia, and could potentially alleviate the strain on Australian shores.

In addition, the international community, under the leadership of the IMO, should work together to review existing law, identify gaps and inconsistencies, and develop new law or codify customary law to promote consistency. Furthermore, the IMO should specifically incorporate situations like the *Tampa*'s into its guidelines for places of refuge. When a vessel encounters a situation that endangers life or property in waters adjacent to a coastal state, a coastal state would then have a duty to allow the vessel to enter a port or sheltered waters for the limited purpose of alleviating the threatening condition. This conditional entry would be balanced against the risk to coastal states associated with the provision of places of refuge. Presumably a coastal state, particularly one which is a party to the Refugee Convention, would rather offer its sheltered waters to a group of migrants coming via a vessel under the coastal state's control than an oil tanker threatening its marine environment. By extending places of refuge to situations involving migrants, vessels like the *Tampa* would have access to sheltered waters of coastal states, thus preventing another weeklong standoff between a rescuing vessel and a coastal state.

IX. CONCLUSION

Ultimately, the international community must clarify the responsibilities of coastal states and fill the gaps in the existing law. People smuggling is an industry that is only going to increase²³¹ and states should

²²⁹ Tran, *supra* note 214, at 479.

²³⁰ *Id.* at 505.

²³¹ *The Tampa*, *supra* note 226. People smuggling is growing at an alarming rate and may provide a larger profit margin than the illegal movement of drugs. *Id.*

be encouraged to ratify the Organized Crime Convention and the People Smuggling Protocol. Recognizing that state sovereignty must be balanced against humanitarian concerns in order to avoid another situation like the *Tampa*'s, the international community must devise a strategy for dealing with mass migration in a humane, consistent way. One such strategy would be to develop comprehensive regional plans in high refugee areas with the support of the international community. Another solution would be to incorporate situations like the *Tampa*'s into places of refuge, currently under development at the IMO, so as to impose a duty on coastal states to allow ships in distress from an unexpected rescue of passengers at sea entry into their ports or sheltered waters. Forcing shipmasters to shoulder the burden puts them in the situation of making political decisions and presents a dangerous temptation for shipmasters to circumvent their duty to rescue. Without clarification of states' obligations under international maritime and humanitarian law, the patterns of the *St. Louis* and the *Tampa* incidents will be destined to repeat themselves.